APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 97-2088

SUZANNE CAHNMANN, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

SPRINT CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 5129—**James B. Zagel**, *Judge.*

ARGUED NOVEMBER 7, 1997—DECIDED JANUARY 7, 1998

Before POSNER, *Chief Judge*, and EASTERBROOK and KANNE, *Circuit Judges.*

POSNER, *Chief Judge.* Sprint, a communications common carrier regulated by the FCC, was sued by customers of Sprint's "Fridays Free" long-distance calling promotion in a class action originally filed in an Illinois state court. The suit was removed to federal district court, which entered judgment for Sprint. The district judge ruled that although the complaint does not allege any violation of federal law and there is no diversity of citizenship, the suit was removable because the sort of claim that the class is making can arise only under federal, and not under state, law. Characterizing the federal claim as one to invalidate a tariff filed with the

FCC, the judge gave judgment for Sprint on the pleadings, on the ground that he would be invading the FCC's jurisdiction if he invalidated the tariff.

In January 1996, Sprint had filed with the FCC a tariff setting forth the terms of a new service intended to attract long-distance customers to Sprint from other telephone companies. The tariff offered, to small businesses that agreed to subscribe to Sprint for a minimum of $50 in long-distance calls per month, up to $1,000 worth per month of free long-distance calls on Fridays to *anywhere in the world* for *one year*. Four months later, Sprint amended the tariff to delete ten countries, including Israel and China, from the offer of free Friday calling, although under the amended tariff customers receive a 25 percent discount off Sprint's regular rates for all calls (not just Friday calls) to nine of the countries (all but the Dominican Republic, for reasons not disclosed by the record).

The class members, several thousand in number, are "Fridays Free" customers who are continuing to call one or more of the ten countries and paying more, on balance, than they would have had to pay had the original tariff remained in force. Sprint claims to have had good reasons, having to do with congested phone lines and customer fraud (residential customers pretending to be small businesses), for amending the tariff. But there is no evidence on the issue, and for purposes of this appeal we assume that Sprint had no good reason for the amendment—or, worse, that it was planning from the start to renege on the offer of a full year of free Friday calls to anywhere in the world.

The first count in the complaint charges that Sprint broke its contract with its "Fridays Free" customers. It promised them the full year; it received consideration for the promise in the form of the minimum monthly paid calls; it broke its promise. Q.E.D. The plaintiff acknowledges that Sprint might interpose as a defense that in reneging on its promise it was merely complying with the amended tariff; that the Communications Act requires a common carrier to comply with its

tariffs, 47 U.S.C. § 203(c); *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 230 (1994); and that the defense might therefore be a good one (though she thinks not). But she points out that a suit cannot be removed to federal court merely on the basis of a federal defense. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10-14 (1983); *Blackburn v. Sundstrand Corp.*, 115 F.3d 493, 495 (7th Cir. 1997).

Public utility regulation and common carrier regulation (essentially the same form of regulation, the term "common carrier" being generally used of firms providing transportation or communications and "public utility" of firms providing electricity or gas) have been rolled back very far in recent years. But a piece of it survives in its pristine form in the provision of long-distance telephone service. The terms and conditions of service are set forth in "tariffs," which are essentially offers to sell on specified terms, filed with the FCC and subject to modification or disapproval by it. Once a tariff is filed and until it is amended, modified, superseded, or disapproved, the carrier may not deviate from its terms. *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922); *Norwest Transportation, Inc. v. Horn's Poultry, Inc.*, 23 F.3d 1151, 1153 (7th Cir. 1994).

The original declared purpose of the tariff system was to prevent the utility or carrier from discriminating in price or service among its customers; a covert purpose was to discourage price competition by preventing secret discounts (tariffs are published documents). George W. Hilton, "The Consistency of the Interstate Commerce Act," 9 *Journal of Law and Economics* 87 (1966). These purposes are no longer widely supported, but the rule remains, vestige though it is: the carrier may not deviate from the terms of the tariff. It doesn't matter how eager both the carrier and its customers are to strike a special, off-tariff deal, *Maislin Industries v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990), or even whether the customer

reasonably relied on the carrier's promise to file the negotiated rate as a tariff. See *id.* at 124 n. 7.

What this means is that the filed tariff is the contract between the plaintiff (and the other members of the class) and Sprint. Or rather tariffs, since there were two. The plaintiff treats the first tariff, the one filed in January of 1996, as the contract between her and Sprint. If Sprint violated the tariff to her detriment, she would be entitled to proceed against Sprint under federal law. She could either seek reparations in an administrative proceeding before the FCC, or she could bring a suit for damages directly under the Communications Act, 47 U.S.C. §§ 206, 207; *Stiles v. GTE Southwest Inc.*, 128 F.3d 904, 907 (5th Cir. 1997); *Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.*, 953 F.2d 1431, 1435 (3d Cir. 1991), though if an issue arose in the suit concerning the validity of a tariff the court would interrupt the litigation and, pursuant to the doctrine of primary jurisdiction, compel the parties to resort to the FCC for a determination of that validity, after which the suit could resume if any other issues, such as relief, remained. *United States v. Western Pacific R.R.*, 352 U.S. 59, 63-65 (1956); *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 120-21 (7th Cir. 1982); *National Communications Ass'n, Inc. v. American Tel. & Tel. Co.*, 46 F.3d 220, 222-23 (2d Cir. 1995); *Allnet Communication Service, Inc. v. National Exchange Carrier Ass'n, Inc.*, 965 F.2d 1118 (D.C. Cir. 1992). Sprint would no doubt defend against the suit on the basis of the amended tariff, which it was duty-bound to comply with. The plaintiff would respond to this defense by asking the FCC to hold the second tariff invalid because unreasonable, see, e.g., *Maislin Industries v. Primary Steel, Inc.*, *supra*, 497 U.S. at 129 n. 10, and that would be the setting in which Sprint's reasons for amending the original tariff would be ventilated and evaluated.

The plaintiff could thus have obtained all the relief to which she is entitled on the contract count—free calls to the ten countries for a full year, if her contract claim is sound—in a judicial or administrative or combined judicial and administrative proceeding under the Federal Communications Act.

The issue is whether her federal remedy is exclusive or whether she can instead seek relief under Illinois' common law of contracts.

The Act does not say, and in fact contains a provision saving other remedies. 47 U.S.C. § 414. Although the provision is broadly written, if it were interpreted literally as permitting a state-law breach of contract suit regarding a tariffed service it would impair the Act's policy of confining telecommunications common carriers to tariffed services and vesting the FCC with primary jurisdiction to determine the validity of tariffs; indeed, it would effectively nullify the tariff provisions of the Communications Act. Such interpretations of savings clauses in common carrier statutes—interpretations that would empower state courts to gut the federal regulatory scheme or would place the carrier under inconsistent obligations—are therefore rejected. See for the general proposition *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298-300 (1976); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915), and *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("the act cannot be held to destroy itself"), and for its application to section 414 of the Communications Act *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994), and *MCI Telecommunications Corp. v. Garden State Investment Corp.*, 981 F.2d 385, 387-88 (8th Cir. 1992). The plaintiff in effect wanted the state court to knock out Sprint's second "Fridays Free" tariff on the ground that it violated the contract created by the original offer of the service and the plaintiff's acceptance of the offer. Such a procedure, bypassing the FCC, cannot have been the sort of thing intended by the savings provision, the proper operation of which is illustrated by *In re Long Distance Telecommunications Litigation*, 831 F.2d 627, 633-34 (6th Cir. 1987). A carrier was accused of having represented that its rates were lower than a competitor's without revealing that, unlike the competitor, it charged its customers for their uncompleted calls. This was a claim of simple fraud, and its adjudication did not require determining the validity of a tariff.

But all that this analysis establishes is that the plaintiff cannot look to the savings provision as a source of a right to challenge the second tariff under state law. Left unresolved is whether the federal Act extinguishes the right to bring a suit for breach of contract under state law when the effect of the suit would be to challenge a tariff. We think the Act does extinguish that right—that it does not just provide a defense that the carrier might interpose in a suit under state law.

Remember that Sprint's tariff (either in its original form or as amended) *is* the contract. Any rights that the plaintiff has to complain about a breach of contract are rights granted to her by the original tariff and protected against the amendment by the principle of reasonableness that the FCC uses to determine the validity of a tariff (or, as here, an amendment to a tariff) when it is challenged. A tariff filed with a federal agency is the equivalent of a federal regulation, *Lowden v. Simonds-Shields-Lonsdale Grain Co., supra*, 306 U.S. at 520; *Western Union Int'l, Inc. v. Data Development, Inc.*, 41 F.3d 1494, 1496 (11th Cir. 1995); *MCI Telecommunications Corp. v. Garden State Investment Corp., supra*, 981 F.2d at 387, and so a suit to enforce it, and even more clearly a suit to invalidate it as unreasonable under federal law (both types of suit being comprehended in the plaintiff's contract count), arise under federal law. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam); *Louisville & Nashville R.R. v. Rice*, 247 U.S. 201 (1918); *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1093-96 (3d Cir. 1995); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968). (*MCI Telecommunications Corp. v. Credit Builders of America, Inc.*, 980 F.2d 1021 (5th Cir. 1993), holds to the contrary, but is impossible to reconcile with Supreme Court authority—the court failed even to cite *Thurston* or *Rice*.) And since the federal regulation defines the entire contractual relation between the parties, there is no contractual undertaking left over that state law might enforce. Federal law does not merely create a right; it occupies the whole field, displacing state law. See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); *Franchise Tax Bd. v. Construction Laborers Vacation Trust,*

supra, 463 U.S. at 23-24; *Bartholet v. Reishauer A.G. (Zürich)*, 953 F.2d 1073, 1075 (7th Cir. 1992).

It is not as if the "Fridays Free" tariff had promised free calls and another provision of a contract between the plaintiff and Sprint had promised to sell the plaintiff a bushel of Ugli fruit at market price. If the promises were severable, *Coplay Cement Co. v. Willis & Paul Group*, 983 F.2d 1435, 1439 (7th Cir. 1993); *In re Balfour MacLaine Int'l Ltd.*, 85 F.3d 68, 81 (2d Cir. 1996), the plaintiff could sue to enforce the latter promise, though not the former. There is no space between the contract and the tariff here, as there was, the Ninth Circuit found, in the arrangement between carrier and customer at issue in *Central Office Telephone, Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981, 989-90 (9th Cir. 1997), cert. granted, 66 U.S.L.W. 3416 (U.S. Dec. 12, 1997); and so there is no room for a state law claim of breach of contract. There probably was no room in *Central Office* either. The dissenting judge pointed out that AT&T was forbidden to offer nontariff services, so there could be no breach of contract claim based on the offer—because there could be no contract. 108 F.3d at 996. But that is a detail so far as the present case is concerned. "[A]lthough a user's refusal to pay charges fixed by a tariff will often arise in the context of a broken contract, the carrier's claim for payment is necessarily based on the filed tariff." *MCI Telecommunications Corp. v. Garden State Investment Corp.*, *supra*, 981 F.2d at 387. Equally, although a carrier's refusal to honor the terms of a tariff (in this case, the first "Fridays Free" tariff) will often arise in the context of a broken contract, the customer's claim for damages resulting from that refusal is necessarily based on the filed tariff, with the added wrinkle that to prevail the customer here had to knock out the second tariff, which she could do only under the Communications Act.

We do not think that *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908), on which the plaintiff puts heavy weight, is inconsistent with our conclusion. True, that case, which the Supreme Court held arose under state law, is very similar to this one (it involved lifetime free passes); and the fact that it arose in the railroad industry rather than the communications

industry is immaterial. But there is a crucial difference. The requirement that the carrier provide the service in question in accordance with tariffed terms didn't come into the law until after the contract between the railroad and the plaintiffs was made and went into effect, so the plaintiffs' claim couldn't have been thought an effort to enforce a tariff or an appeal to the regulatory commission's power to invalidate one. It was a state-law claim whether or not subsequently extinguished by the passage of the federal law putting the subject matter of the contract under tariff regulation.

Although in our case the claim of breach of contract can be maintained only under federal law, the plaintiff emphatically disclaims any intention of prosecuting a federal claim; and it might seem therefore that the district court could not acquire jurisdiction and so should have sent the case back to the state. But the only reason to do that would have been to permit the plaintiff to proceed in state court on her breach of contract claim. Yet we have just seen that this claim can be maintained only under federal law. If on remand to the state court the plaintiff tried to press the claim in that court, she would be trying to litigate what could only be a federal claim, however denominated by the plaintiff, and so it would again be removable to federal court. The entry of judgment for the defendant was necessary and proper to end the cycle. This is an uncontroversial application of the "artful pleading" doctrine. See *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 611 (7th Cir. 1997). If a claim can arise only under federal law, because federal law has extinguished the state law basis under which it might otherwise arise, the case is removable to federal court even if the plaintiff sedulously avoids mention of federal law in his complaint.

A separate question is whether the plaintiff's other counts, which charge fraud, can be said to arise under state law. If so, the district judge, when he dismissed the breach of contract claim on the ground that it could only be federal (and the plaintiff didn't want to remain in federal court to press a federal claim), should have relinquished jurisdiction over the fraud counts, now reconceived as supplemental state law

claims to a federal claim dismissed before trial. 28 U.S.C. § 1367(c)(3); *Korzen v. Local Union 705*, 75 F.3d 285, 289 (7th Cir. 1996); *Rhyne v. Henderson County*, 973 F.2d 386, 395 (5th Cir. 1992). The plaintiff charges fraud under several Illinois fraud and consumer protection statutes as well as under the state's common law of torts, but there is no need to discuss the statutes separately. The charge is that Sprint misrepresented to prospective customers that the "Fridays Free" service would entitle them to a full year of free calls on Friday to any country in the world, rather than four months of free calls on Friday to any country in the world and eight months of free calls on Friday to any country in the world minus ten and a 25 percent discount on calls to nine of these countries any day of the week. It is not clear from the complaint whether the misrepresentation consists of a failure to disclose Sprint's right under the Communications Act to amend the tariff or a failure to disclose that Sprint never intended to keep the original tariff in force for a full year.

The principal relief sought is an injunction against continued misrepresentation, an injunction requiring Sprint to honor the promise in the original tariff, and compensatory damages. The request for an injunction against misrepresentation is a throwaway, since there is no suggestion that Sprint is concealing the terms of the amended tariff from any members of the class. With that put to one side, the relief sought by the fraud counts is identical to that sought by the contract count: the free calls promised in the original tariff. It seems, then, that in this case "fraud" is just another name for "breach of contract," so that to allow the plaintiff and her class to proceed in state court under state fraud law would allow the original tariff to be enforced, and the amended tariff set aside, in a suit under state law, which we just said is not allowed. Cf. *Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 489-90 (8th Cir. 1992); *Marco Supply Co. v. AT&T Communications, Inc.*, 875 F.2d 434, 436 (4th Cir. 1989) (per curiam). It would be just another form of artful pleading, as we know from cases in other areas of law in which plaintiffs seek to avoid

federal jurisdiction over contract claims by recharacterizing them as fraud claims. E.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985); *Anderson v. Humana, Inc.*, 24 F.3d 889 (7th Cir. 1994).

This may seem a harsh conclusion. One can imagine Sprint making egregious misrepresentations to poor people ignorant of tariff regulation—promising for example a lifetime of free calls for an advance fee of $5,000, followed the next day by the filing of a tariff changing "lifetime" to "one month." But we know from *Maislin* that even reasonable reliance on a carrier's representation will not allow a suit complaining about the representation to be litigated under state law if the representation concerns a tariffed service. And the victims of Sprint's misrepresentation (if that is what it was) would still have a remedy, only under federal rather than state law, under the same provisions that authorize suits to enforce and to invalidate tariffs, see 47 U.S.C. § 204; *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987); *American Broadcasting Cos. v. FCC*, 643 F.2d 818, 822 (D.C. Cir. 1980)—which the hypothetical poor people's suit would be, just like the suit in this case of which our hypothetical is merely a hyperbolic variation. The plaintiffs could obtain damages and a reasonable attorney's fee, though not punitive damages. See 47 U.S.C. § 206. From a systemic standpoint the federal remedy is preferable, since class actions of thousands or perhaps even millions of telephone subscribers, litigated in state court under state law, could disrupt the federal regulatory scheme.

Once the plaintiff's claim was properly recharacterized as a challenge to the amended tariff, the doctrine of primary jurisdiction should have been invoked and the plaintiff told to repair to the FCC. But as it is plain that the plaintiff didn't want to do this, that she wanted to stand or fall on her claim that this is really a suit under state law, the district judge was right to enter judgment for Sprint rather than merely staying the suit to allow the parties to ask the Commission for a ruling on the reasonableness of the second, the amending, tariff.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 7, 1998

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

No. 97-2088

SUZANNE CAHNMANN, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

SPRINT CORPORATION, a Kansas corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 5129—James B. Zagel, Judge.

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B

[Dated April 21, 1997]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SUZANNE CAHNMANN, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	No. 96 C 5129
v.	)	Judge James B. Zagel
SPRINT CORPORATION, a Kansas corporation,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Suzanne Cahnmann filed this case in state court describing it as "a class action by customers enrolled in defendant Sprint's 'Fridays Free' long distance calling promotion, promising customers who signed up would pay nothing for a year of long distance calls [anywhere in the world] on Friday." All the customers had to do was meet a monthly billing minimum on the calls for which they did pay. Although Sprint initially honored the agreement, on or about April 18, 1996, Sprint unilaterally began charging these customers for Friday calls to nine countries, albeit at a [25%] "discounted" rate. Essentially Sprint says that the change was required "by dramatic international calling volume increases that affected Sprint's ability to provide international calling services and threatened its ability to provide timely domestic service." On its face this is not a very appeal-

ing explanation, a variation of "I know I agreed to do this and you are paying the agreed upon price, but it is too difficult for me to deliver so I am just going to deliver 25% of what I agreed to deliver. God speed and good luck to you." This explanation can be offered with a straight face only because a regulated telecommunications company like Sprint has, at times, the duty to provide a minimum level of service to all its customers even at the expense of special services to some of its customers.

The first thing before me is not the validity of the claim or the explanation. It is the question of whether anything ought to be before me.

Sprint removed the case to this court and Cahnmann wants to have it remanded.

The removal is defended on the grounds that this is a federal claim disguised by artful pleading as a state law claim. The artful pleading doctrine denies a plaintiff the right to plead his case away from federal court if the only way he can do so is to omit facts that indicate federal jurisdiction or omit federal questions that are essential to recovery. *See Burda v. M. Ecker*, 954 F.2d 434, 438 (7th Cir. 1992). The doctrine is not often applied. It obviously has no application where federal law has no preemptive effect, but its application is not dependent on the existence of complete preemption. What is required is that the state court pleading actually invokes federal law and not state law. Stated another way, complete preemption on the ERISA model is not a sine qua non of the artful pleading doctrine, what is essential is that the true claim be a federal claim and not a state claim by virtue of federal legislation. *See Marcus*

v. A.T.&T. Corp., 938 F. Supp. 1158, 1165-69 (S.D.N.Y. 1996).

Is this claim artfully pleaded? I think so. By speaking generally of contract and misrepresentations to state its claims of contract breach and of fraud and deception, the complaint artfully avoids the obvious. Sprint must charge its customers in conformity with the tariffs it filed with the Federal Communication Commission. 47 U.S.C. § 203(a) (1994). Properly drafted the complaint would have said that Sprint agreed to bill its customers in conformity with its filed tariff and then amended the tariff despite its promise not to amend the tariff for one year. It would also have said that it represented it would not amend the tariff for one year and did so knowing the representation was false. The complaint is written to avoid any mention of the rate setting and rate charging mechanism for long distance phone calls because, of course, Congress has given the FCC sole authority in this area (absent surrender of that authority which has not occurred). This is a complaint about the right of Sprint to bill in a certain way, and it is a federal claim. I concur with the analysis of other judges who have reached the same conclusion. *See Marcus v. A.T.&T. Corp., supra*; *In re Comcast Cellular*, 949 F. Supp. 1193 (E.D. Pa. 1996); and *Mellman v. Sprint*, 96 cv 119-MMP (S.D. Fla. 1996).

Sprint raises one other ground for federal jurisdiction. There is diversity. The individual claims are relatively small not reaching the jurisdictional amount. They cannot be aggregated. Sprint relies on the proposition that there is a request for injunctive relief which, if granted, would cost more than $50,000.

Under *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389 (7th Cir. 1979), the jurisdictional amount is met if the cost of the relief to defendant exceeds this amount even if the benefit to any single plaintiff does not. If the jurisdictional amount is satisfied in this way, then I have jurisdiction over that claim and all the others would come with it under supplemental jurisdiction. I think this is a good theory, and I applied it more than fours years ago. *Allen v. Citicorp Mortgage Co.*, 90 cv 5357 (N.D. Ill. 1990). Both the Fifth and Seventh Circuits took this view. *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-31 (7th Cir. 1996); *In re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995). The theory does not apply here, the cost of the injunctive relief to Sprint is simply the aggregate of all the claims of the individual class member. In *Allen v. Citicorp*, plaintiffs sought an injunction which would have required the defendant to re-program its computers which calculated escrow payments for many thousands of customers. If just a single plaintiff or a small class of plaintiffs had prevailed, the cost of reprogramming would still have exceeded the jurisdictional amount. The same reasoning was applicable in *Loizon v. SMH Societe Suisse*, 950 F. Supp. 250 (N.D. Ill. 1996) where the plaintiffs sought an order requiring defendant to notify a large number of persons of certain product hazards. The cost of compliance with such an order exceeded the jurisdictional amount even if only one class member prevailed in the case. The principle which Sprint seeks to use requires that its cost be computed without aggregation of individual claims. Thus Sprint cannot invoke this principle, and its diversity jurisdiction argument fails.

Sprint asks for judgment on the pleadings.

Sprint is a national company and this lawsuit has been filed in some other places as well as here. Sprint has developed a defense and has seen it prevail elsewhere. Cahnmann's lawyers have seen what has gone before and have offered grounds on which they will stand.

The Sprint theory is simple and I state it without citations. The core of the Federal Communications Act is a requirement that telecommunications providers tell the FCC what they will charge for each of their services. They file a tariff with their rates. The FCC has the power to decide whether the filed rates are reasonable. The providers have to stick to those rates, charging neither more nor less. Even if they explicitly agree with a customer to alter the rate, the agreement has no legal effect. The tariff, the filed rates, are publicly available and the law presumes a provider cannot effectively misrepresent its rates. Whatever the salesman says and whatever is advertised, the consumer can learn the truth from the FCC. And it matters not if the claim arises from an amendment to a tariff which changes the rates. The customer is presumed to be aware that amendments to tariffs are always possible. If the customer does not like the amendment, the customer has standing to complain to the FCC which can invalidate the amendment. There is, therefore, no contract to enforce, and Cahnmann's reliance upon the representations of Sprint is not a permissible basis for a damage claim. And were it permissible, there is no way that damages can be awarded. If a court were to order Sprint to compensate Cahnmann for the costs of her overseas

calls on Fridays, it would be modifying the tariff and only the FCC has that power. This defense is sound and I see no reason to restate the statutory and decisional bases for it, since that has already been done well by Judges Ross and Gibbons respectively in *Birnbaum v. Sprint Communications*, 96 CV 2514 (ARR), 1996 WL 897326 (E.D.N.Y. 1996) and *Kutner v. Sprint*, 96-2534 GV (W.D. Tenn. 1997). The defense was also sustained in a slightly different context by Judge Mukasey in *Marcus v. A.T.&T. Corp., supra.*

Cahnmann does not concede any of this but argues that even if these are the rules of this game, she can still win because all she asks is that I enforce the original tariff. This way, she reasons, I do not tromp upon the powers of the FCC and it is still a "tariff" that is the source of her telephone bills. The obvious difficulty is that I would not be enforcing "the" tariff, I would be enforcing a different tariff. I do not believe that the Federal Communications Act would permit a court to choose among several tariffs filed by a single company over the years and enforce whichever one it selects.

There are cases which enforce a tariff against claims of retroactive amendment, but there is no claim here that Cahnmann has been charged for Friday calls which occurred prior to the amendment. Cahnmann does argue, as a last resort, that there is a retroactive amendment here because the tariff said "customers can receive free usage (outbound international only) on one day a week (such day to be determined by Sprint) for 12 months." *See Alabama State Docks Dept. v. Bunge Corp.*, 655 F.2d 64, 67 (5th Cir. Unit B 1981) (ordinary rules of contract interpretation apply to interpret tariff

language). This argument is sketched rather than made.[1] There is no precedent, cited to me, for the proposition that "customer can" is, in a tariff, the equivalent of saying "the company must provide such service" or "the company promises to provide the service for up to 12 months if that is what the customer elects." I am under no obligation to consider such an undeveloped argument and I refuse to do so. *United States v. Giovannetti*, 919 F.2d 1223, 1229 (7th Cir. 1990) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is a good point despite a lack of supporting authority or in the face of contrary authority, forfeits the point.").

Cahnmann cannot prevail and secure the principal relief she seeks. Her contract claim dies because it is the tariff and not the contract that controls the terms of business between Cahnmann and Sprint. The fraud claims fail because damages are not possible without a judicial amendment of the tariff which is forbidden. This reasoning would apply even if Cahnmann had made the more extreme allegation that Sprint had offered Free Fridays, deliberately intending to amend the tariff after

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[1] In its entirety the argument starts by quoting the tariff and then says: "It confers a right to the consumer. Any argument to the contrary by Sprint is futile. In fact, when Sprint wished to retain discretion under the tariff it specifically said so. (. . . . stating customers are entitled to one day a week of free calls 'such day to be determined by Sprint')." There was a footnote which added "As a verb [can means] to be enabled by law, agreement or custom; to have a right to." Black's Law Dictionary, 206 (6th ed. 1990); "to have the right or qualifications to . . . can denotes power or ability to do something": Webster's Encyclopedic Unabridged Dictionary of the English Language, 215 (1989 ed.).

it had lured enough customers to its service.[2] There is no fraud exception to the rule which denies judicial remedies to those who are charged the filed rates. *See Taffet v. Southern Co.*, 967 F.2d 1483, 1488-90 (11th Cir. 1992) (en banc).

The damage claims under state law are untenable since both applicable state laws, found in the Illinois Consumer Fraud and Deceptive Business Practices Act, contain specific exemptions for "actions or transactions specifically authorized by . . . any regulatory body . . . acting under statutory authority of . . . the United States," (815 ILCS 505/10b), and "conduct in compliance with . . . rules of . . . a Federal . . . agency," (815 ILCS 510/4). In *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 98 Ill.Dec. 24, 493 N.E.2d 1045 (1986), the leading state case, the state court never confronted the question of whether damages (as opposed to other remedies) were available.

Finally, there is a routine request in the complaint for a permanent injunction against continuing to advertise Free Fridays, but this relief cannot be granted on these pleadings. There is one allegation that such continuing advertising is occurring, but it is clear that the Free Friday program still exists for all but nine nations. Whether the current advertising is deceptive cannot be discerned from the pleadings (and this is unsurprising since the worth of this claim to Cahnmann is nil be-

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[2] Bait and switch is an unlikely tactic in an industry where the customer can challenge the reasonableness of the new rates at the FCC and, more importantly, can simply change carriers.

cause she now knows the truth). There might be some declaratory or injunctive remedy left to pursue under state law, but I do not see it appropriately pled in this case and I suspect there is little financial incentive to do so.[3] In defending against the motion for judgment on the pleadings, the plaintiff never raises the non-monetary remedies as a reason to keep the case alive. Indeed, in arguing for its motion to remand, plaintiff eschews the significance of injunctive relief. Claims for something other than damages are, I find, not effectively prosecuted here.

The motion of Sprint for judgment on the pleadings is granted. The motion of Cahnmann to remand is denied.

ENTER:

/s/ James B. Zagel
United States District Judge

DATE: April 21, 1997

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[3] This case was filed as a putative class action but no motion for class certification was ever filed. If one were, I doubt that plaintiff would be an appropriate class representative since the false advertising claim which would form the basis for injunctive relief would not fit her case well. If Sprint has continued to advertise Free Fridays in a deceptive way at some time after the change in tariff, an appropriate plaintiff might exist, but it is not Suzanne Cahnmann.